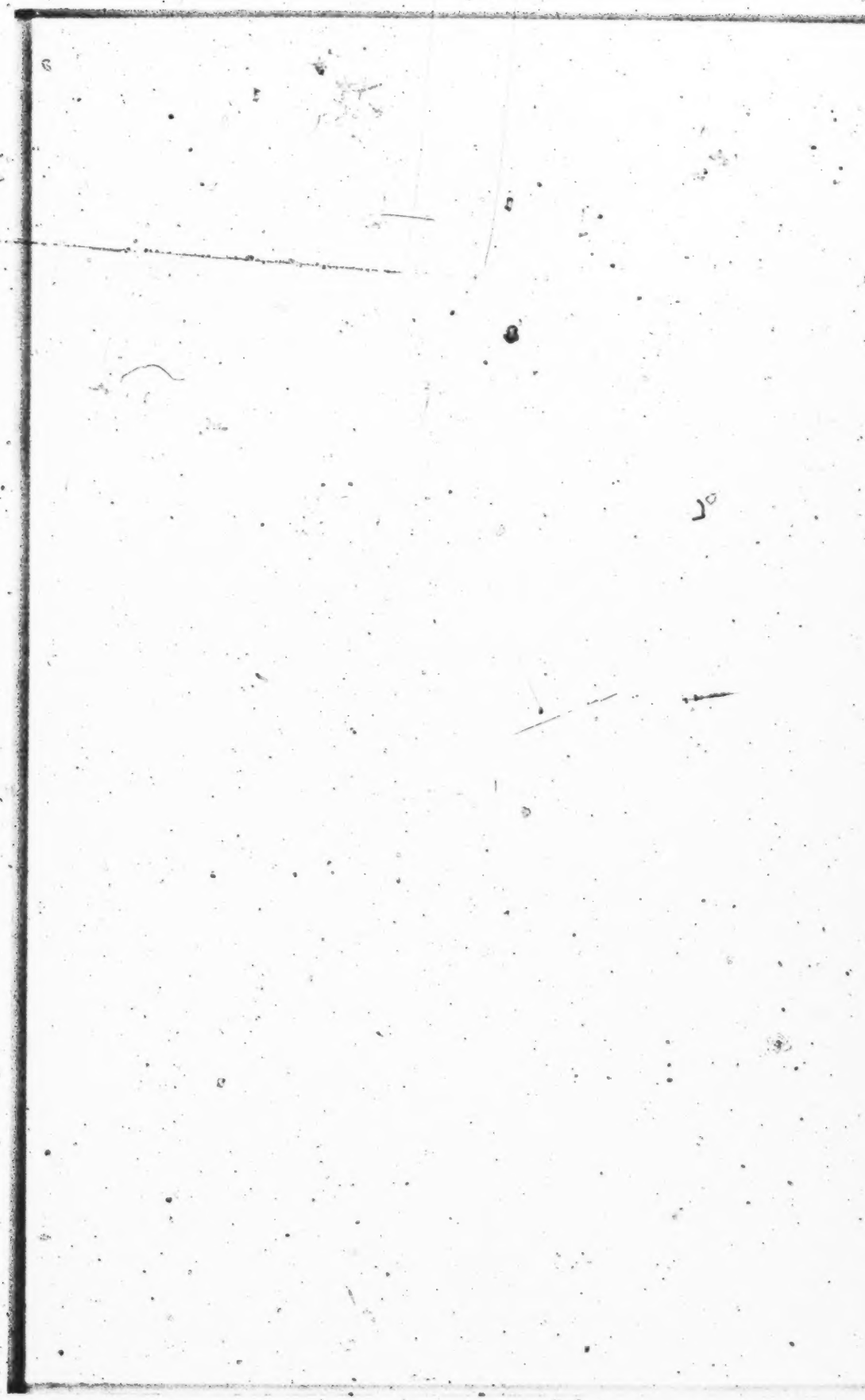

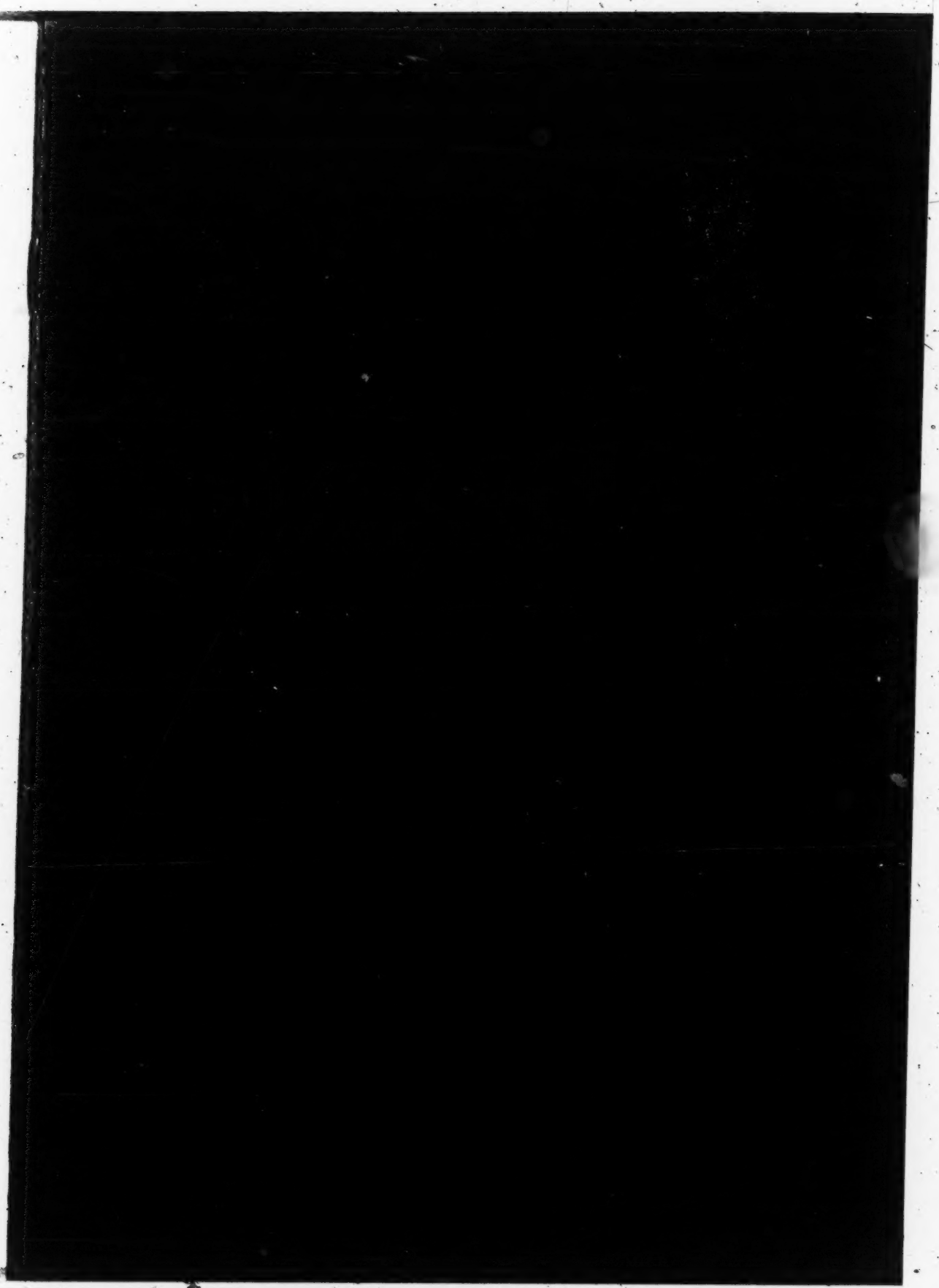

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967
No. 669

UNITED NATIONAL LIFE INSURANCE COMPANY, PIONEER LIFE INSURANCE COMPANY and NATIONAL LIBERTY LIFE INSURANCE COMPANY,

Appellants,

vs.

STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS.

Appellee, pursuant to Rule 16 of the Revised Rules of this Court, moves that the appeal be dimissed on the ground that the question presented is so unsubstantial as not to warrant further argument.

Question Presented.

Whether the Due Process Clause of Amendment Fourteen to the United States Constitution, or the Commerce Clause (Art. I, §8, cl. 3) of the United States Constitution, or the McCarran Act (15 U.S.C. §§1011-1015) prevents the regulation by California of insurance companies which, by mail, regularly solicit from and negotiate life insurance policies with residents of California, when this regulation is identical to the regulation of domestic insurers.

Statement.

The facts are fully and fairly presented in the opinsions below, attached as appendices A, B, and C to the Jurisdictional Statement. The opinion of the California Supreme Court (App. A to Jd. Statement) upholds the right of the State of California to regulate mail order insurers who have substantial contacts with California, including the regular and substantial solicitation of and negotiation of life insurance with California residents. On August 18, 1967, pursuant to the opinion of the California Supreme Court, identical permanent injunctions were entered against the three appellants here. This injunction is set out as Appendix I to this Motion. This injunction affects only the future acts of appellants, and specifically permits them to maintain in effect all existing policies and rights existing thereunder, and permits appellants to answer any inquiries regarding conversion rights and privileges under policies already in effect.

The application of California Insurance Code Section 700 to mail transactions extends back at least to 1928. In that year, opinion 6386 of the Attorney General, rendered at the request of the Insurance Commissioner, advised that California could license and regulate foreign insurers who solicit and negotiate insurance by mail with local residents. (Cal. Sup. Ct. Op.; Jd. Statement, pp. 22a-23a.)

In 1961 (and again in 1965), with one of the very appellants here, the Insurance Commissioner required that mail order insurance transactions be subjected to local regulation. (App. Closing Br. in Cal. Ct. App., pp. 4-5, and Exs. to said Br.) In this historical context, and construing the McCarran Act as interpreted by this Court, California's regulation of mail order insurance was upheld in the instant case.

ARGUMENT.

There Is No Substantial Federal Question.

A. The Local Regulation of Mail Order Insurance Companies Based on Substantial Solicitation and Negotiation Has Been Specifically Upheld.

With the exception of appellants' contentions based on *National Bellas Hess v. Dept. of Revenue,* 386 U.S. 753 (1967), every argument raised here was raised in the courts below, and by the parties and amicus in *Ministers Life and Casualty Union v. Haase,* 141 N.W. 2d 287 (1966), *appeal dismissed,* 385 U.S. 205 (No. 634 Oct. Term, 1966). It would be unduly repetitious to repeat appellee's position on these questions since that position is set out in the briefs below and in the amicus brief filed by appellee in the *Ministers Life* case. The amicus brief in *Ministers Life* has been served on appellants and we incorporate said brief by this reference.

Appellants' attempt to distinguish *Ministers Life* on the ground that "group leaders"—in effect, agents or representatives, were present in Wisconsin. (Jd. Statement, pp. 17-18.) However, as the briefs before this Court show, the *Ministers Life* case was not argued on this basis, all parties treating the case as one involving mail order regulation. Thus, the issue as presented by Ministers Life, at page 3 of its Jurisdictional Statement, is stated as:

> "Does Section 201.42 of the Wisconsin Statutes, enacted by Chapter 397 of the Wisconsin Laws of 1961, purporting to regulate and tax out-of-state insurance companies which transact insurance business with Wisconsin residents by mail and are not licensed in Wisconsin and have no offices, agents, employees or property within Wisconsin, violate the Constitution of the United States for any one of the following reasons:"

Neither the Wisconsin nor the California Supreme Court treated the outcome of *Ministers Life* as resting on the presence of group leaders, such leaders being considered only an additional contact to be weighed along with other contacts in testing the validity of local regulation of mail order insurance. *Ministers Life and Casualty Union v. Haase, supra,* 141 N.W. 2d 287, 295; *People v. United National Life Ins. Co.,* 66 A.C. 602, 619, 58 Cal. Rptr. 599, 610, 427 P. 2d 199, 210 (1967). And, as pointed out by the California Supreme Court, the contacts with California of the appellants in this case are numerous and substantial. 66 A.C. at 618-619, 58 Cal. Rptr. at 609-10, 427 P. 2d at 209-210. Since *Ministers Life* was argued as a mail order case, and decided as such by the Wisconsin Supreme Court, and since this Court dismissed the appeal for want of a substantial federal question, *Ministers Life* is controlling here, and likewise, the instant appeal should be dismissed.

B. National Bellas Hess Does Not Overrule or Conflict With Ministers Life.

In an attempt to extricate themselves from the effect of this Court's decision in the *Ministers Life* case, appellants argue that the decision in *National Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, is in conflict with, and controlling over, the decision in *Ministers Life.* (Jd. Statement, pp. 18-20.)

National Bellas Hess involved the validity of an Illinois statute requiring an out-of-state mail order retailer to collect Illinois use tax on goods sent into Illinois. The tax was viewed by this Court as an undue impediment on interstate commerce, since National en-

joyed no protection from local government and, therefore, could not be taxed to support local government. (386 U.S. 753, 759-60.) The question involved in *National Bellas Hess*, therefore, was purely one of taxation, and not of regulation of a business for the protection of the public health, welfare, and morals, such as involved here and in *Ministers Life*. This distinction is a vital one and has been long recognized by this Court.

In *Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949), this Court said:

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." "Taxation that threatens interstate commerce with prohibition or discrimination is bad, Nippert v. Richmond, 327 U.S. 416, 434, but regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason." *Breard v. Alexandria*, 341 U.S. 622, 638 (1951).

This case, as *Ministers Life*, primarily involves regulation of policies sold to local residents by out-of-state mail order insurance companies. No attempt to tax for bare economic advantage or discrimination is involved. There is no taxation without regulation, but only regulation equal and coextensive with that of purely local insurers. Such nondiscriminatory regulation, imposed by requiring a certificate of authority, does not unduly

burden interstate commerce, nor does it violate due process *Robertson v. California,* 328 U.S. 440, 457-61 (1946); *Breard v. Alexandria, supra.*

The same issues urged here as grounds for invalidating local regulation were urged in the *Robertson* and *Ministers Life* cases, and in both of those cases, the local regulations were upheld. Therefore, those cases are controlling here.

We have no quarrel with the decision in *National Bellas Hess,* for we are not here attempting taxation without regulation. What we have here is a comprehensive system of equal regulation of all insurers, foreign as well as local. Therefore, *National Bellas Hess* is not applicable to the instant case.

As they have done with *Ministers Life,* appellants would no doubt attempt to distinguish *Robertson* on the basis that there, an agent was present in the state, whereas here, no agents are present in California. But *Robertson* does not say that the foreign insurer is subject to regulation because it had an agent in the state. *Robertson* holds that the agent is subject to regulation because the foreign insurer itself is subject to regulation:

> "It would be idle to require licensing of insurance agents, in order to secure honesty and competence, yet to place no restraint upon the kind of insurance to be sold or the kinds of companies allowed to sell it, and then to cover their representatives with their immunity. . . ." (328 U.S. at 457.)
>
> "It is quite obvious . . . that if appellant's contentions were accepted and foreign insurers were to be held free to disregard California's reserve requirements and then to clothe their agents or others

acting for them with their immunity, not only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. . . ." (328 U.S. at 459-60.)

That *Robertson* and *Ministers Life* support the local regulation of mail order insurance, and that *National Bellas Hess* invalidates only taxation which is unrelated to nondiscriminatory local regulation, is shown by *Fairfax Family Fund, Inc. v. California,* 382 U.S. 1 (1965). There, regulation by California of a purely mail order small loan company was upheld, under the *Robertson* case, as against the contention that such regulation was an undue burden on interstate commerce. While *Fairfax* involved only a Commerce Clause question, both *Robertson* and *National Bellas Hess* indicate that the Due Process and Commerce Clause limitations are coextensive. (*Robertson v. California, supra,* 328 U.S. 440, 461; *National Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, 756; Jd. Statement, p. 19.) Since *Robertson* is a pre-McCarran Act case, it is fair to say that, even by pre-McCarran Act standards, the Due Process and Commerce Clause limitations, as applied to the regulation of mail order insurance, are coextensive. Therefore, if *Robertson,* a pre-McCarran Act case, supports the regulation of mail order small loan companies as against challenge under the Com-

merce Clause, it must also support such regulation under the Due Process Clause, and by direct analogy to *Fairfax,* it must support the regulation of mail order insurance under both clauses.[1] Any attempt to distinguish *Robertson* or *Ministers Life* on the basis that the insurance businesses there were not purely of a mail order nature must fail because of *Fairfax* in which purely mail order regulation was upheld on the basis of *Robertson.*

Conclusion.

We cannot and do not believe that the Due Process Clause, the Commerce Clause, or the McCarran Act prevent California from providing its citizens with the protection offered by the California Insurance Code, simply because appellants do their business by mail. On the basis of the *Robertson* case, and the *Ministers Life* case, and for the reasons urged here and in appellee's amicus brief in *Ministers Life,* we respectfully request that the appeal be dismissed for want of a substantial federal question.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,
H. WARREN SIEGEL,
Deputy Attorney General,
Attorneys for Appellee.

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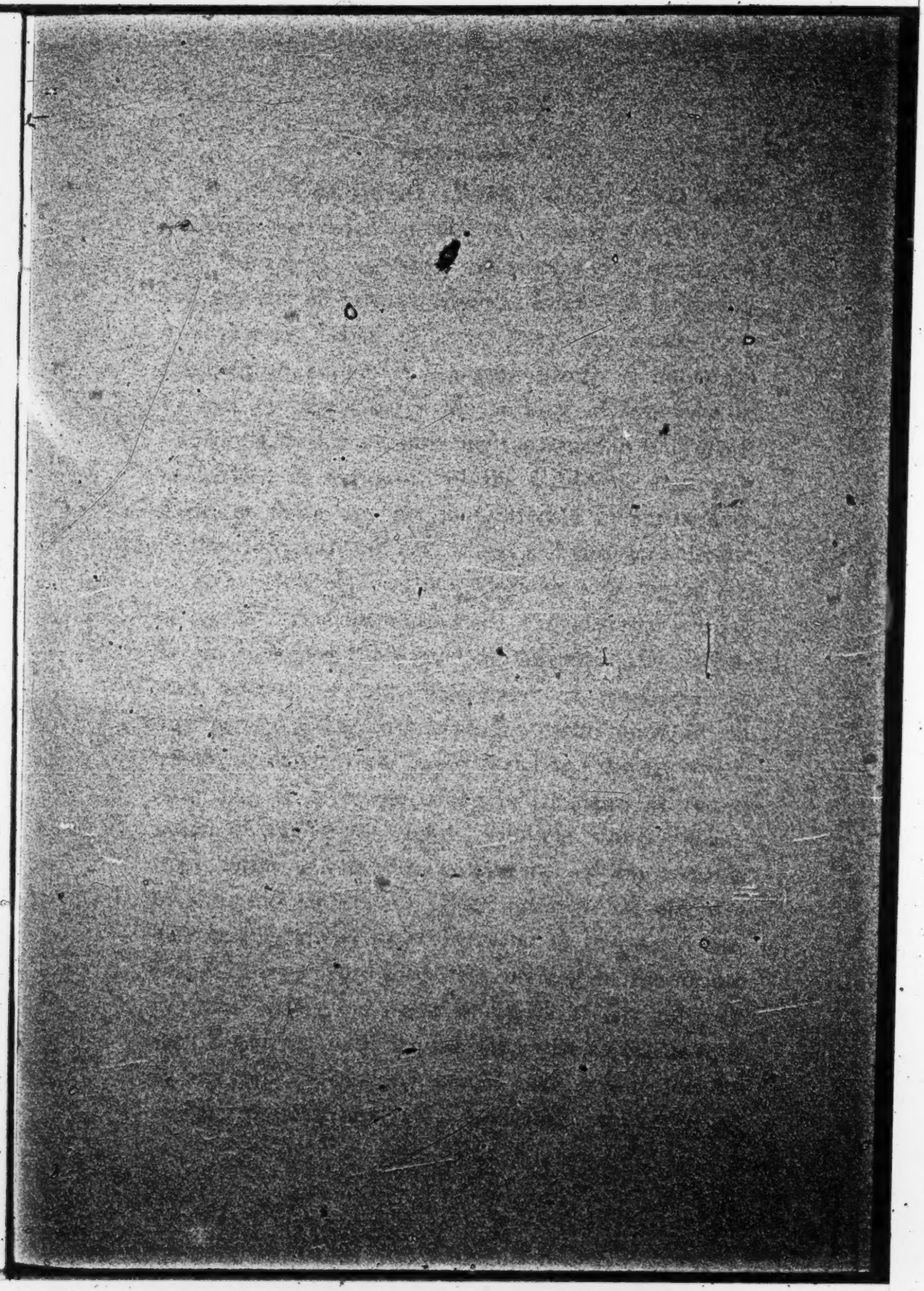
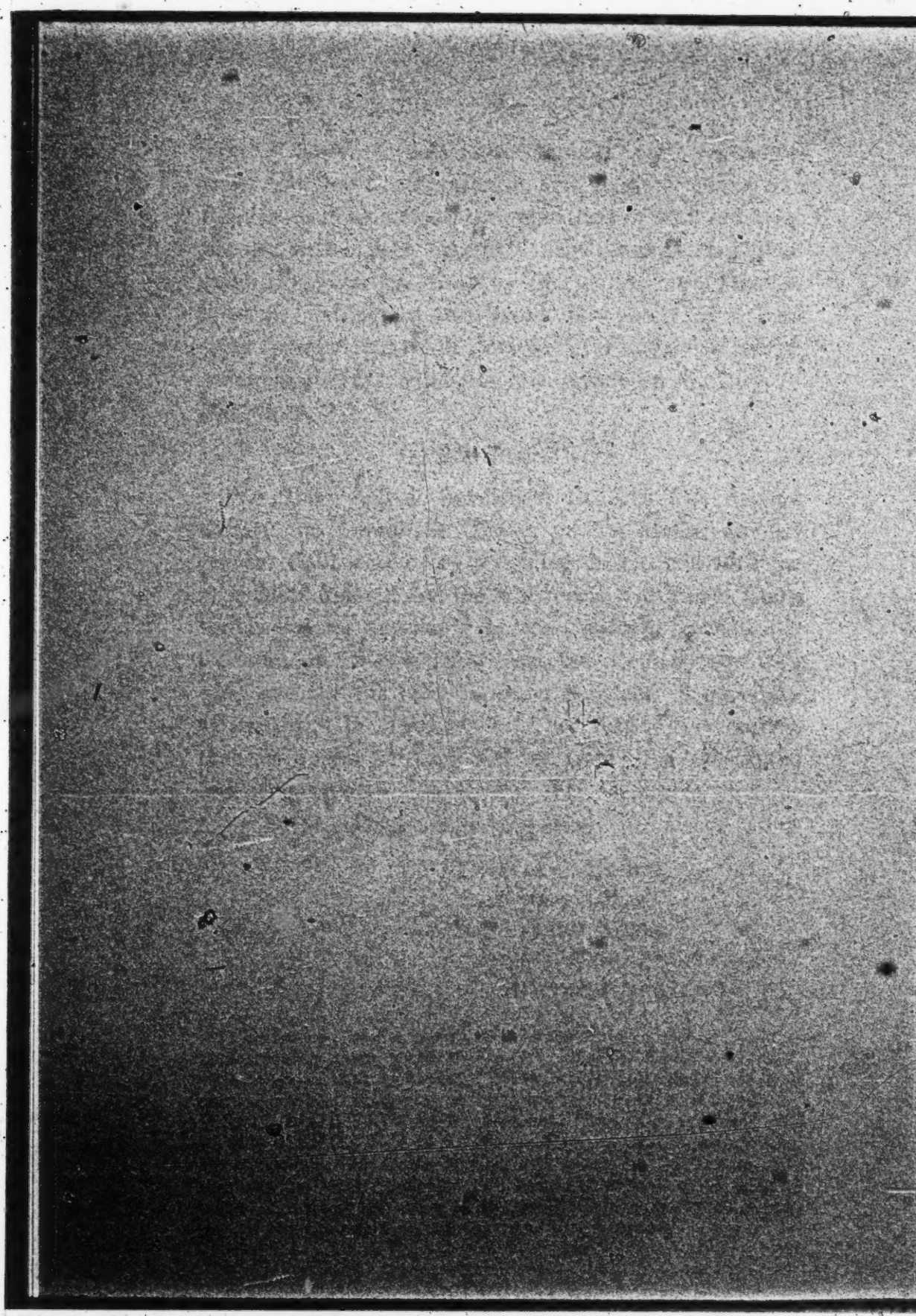
[1]The analogy of the insurance business to the lending business is compelling since, prior to *United States v. Southern Underwriters Assn.*, 322 U.S. 533 (1944), neither insurance nor loan contracts were considered to be commerce. *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1868); *Standard Home Co. v. Davis,* 217 F. 904, 915 (D.C.E.D. Ark. 1914). Thus, if *Robertson,* decided after *Southeastern Underwriters* but before the McCarran Act, supports the local regulation of the interstate mail order lending business, it must also support the pre-McCarran Act local regulation of the interstate mail order insurance business.





APPENDIX I.

Injunction.

IT IS ORDERED, ADJUDGED AND DECREED that defendant and its successors in interest, and its agents, servants, representatives, employees, and any and all persons acting in concert or in participation or on behalf of it or them, are hereby permanently enjoined from engaging directly or indirectly, by mail or otherwise, in the business of insurance in California, or from transacting insurance in California, as defined in section 35 of the California Insurance Code, or doing any act in California in furtherance of the aforementioned acts, unless and until a certificate of authority is obtained in compliance with section 700 of the California Insurance Code. Provided that nothing herein contained shall preclude defendant, its successors, agents, servants, representatives, employees, or any person acting in concert or participation or on behalf of it or them from honoring, giving notice, enforcing, or otherwise acting in pursuance or recognition of any of the rights, privileges, duties, obligations, terms or conditions arising out of any contract of insurance either (1) issued prior to the effective date hereof, or (2) issued hereafter to an insured outside California (provided, that nothing in this clause (2) shall affect the rights or duties of any party to such a contract under the law otherwise applicable to it at any time). Nothing herein shall permit the defendant to solicit any new or additional contract of in-

surance, or conversion thereto, except that defendant may answer any inquiries and send any notices regarding conversion rights or privileges.

For plaintiff's costs of suit herein in the amount of $.....

Dated: August 18, 1967.

Richard L. Wells
Judge of the Superior Court